In the Supreme Court of the United States

October Term, [illegible]

Efstathios A. Karahalios,
Petitioner,

v.

Defense Language Institute/Foreign Language Center, Presidio of Monterey, and Local 1263, National Federation of Federal Employees,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR RESPONDENT LOCAL 1263, NATIONAL FEDERATION OF FEDERAL EMPLOYEES

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-636

EFTHIMIOS A. KARAHALIOS,
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DEFENSE LANGUAGE INSTITUTE/FOREIGN LANGUAGE CENTER, PRESIDIO OF MONTEREY, and LOCAL 1263, NATIONAL FEDERATION OF FEDERAL EMPLOYEES,
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The citations to the opinions below, the basis for this Court's jurisdiction, and the statutory provisions involved are correctly set forth in petitioner's brief at 1-2 and 1a-11a and are therefore not repeated here.

COUNTERSTATEMENT OF THE CASE

Plaintiff Efthimios Karahalios, petitioner herein, at all times relevant was a Greek language instructor at the Defense Language Institute in Monterey, California

("the Institute"). Respondent Local 1263, National Federation of Federal Employees ("the Union") is the exclusive bargaining representative of the professional employees of the Institute.

In 1976, the Institute created a course developer position. Plaintiff applied for that position as did Simon Kuntelos, another Greek instructor who had worked at the Institute for ten years longer than plaintiff and who had served as a course developer for the Institute from 1963 to 1971, when the Institute abolished the position solely as the result of a reorganization. Plaintiff was tested for the course-developer position and received a score of "81"; Kuntelos declined to take the test in protest over the fact that, although listed as the "best qualified" candidate, he had not been permitted to return on a non-competitive basis to the position he had held previously. As the only person to complete the competitive selection process, plaintiff won the position.

Kuntelos filed a grievance alleging that the Institute had violated the collective bargaining agreement and the applicable personnel regulations by failing to award the course developer job to him non-competitively. In August, 1977, an arbitrator sustained the grievance in part and ordered that the position be declared vacant.

Following the arbitral award, the Institute proceeded to refill the position; in that connection Kuntelos agreed to take the test that plaintiff had taken previously, with the understanding that if Kuntelos scored 85 or above, he would be the only employee referred to the selecting official. Because the Institute had altered the promotion selection procedures since plaintiff had taken the test, Kuntelos was allowed more time to complete the test than plaintiff had been afforded. Kuntelos did not obtain a score of 85, however, and both Kuntelos and plaintiff were referred to the selecting official. In May, 1978, the Institute awarded the course developer position to Kuntelos and reduced plaintiff's rank to the instructor position he had held previously.

In response to Kuntelos' selection, plaintiff filed two grievances protesting the process by which Kuntelos had been selected and seeking the opportunity to be reconsidered for the course developer position. The Union sought the advice of its legal counsel with respect to plaintiff's grievances and was advised that the Union had a conflict of interest in prosecuting those grievances in light of the Union's prior, successful representation of Kuntelos. Based on that advice, in January, 1979, the Union Executive Board decided not to appeal the grievances to arbitration.

Four months after learning of the Union's decision, plaintiff filed unfair labor practice charges with the Federal Labor Relations Authority ("FLRA") alleging that the Institute had breached the collective bargaining agreement and that the Union had violated its duty of fair representation under § 7114(a)(1) of the Civil Service Reform Act of 1978, 5 U.S.C. § 7114(a)(1) ("CSRA"). While those charges were pending before the General Counsel of the FLRA, the Institute again eliminated the course-developer position and Kuntelos was reassigned back to an instructor position.

In June, 1980, the FLRA General Counsel decided to issue a complaint against the Union premised on the view that insofar as the Union had based its decision not to arbitrate plaintiff's grievance "on considerations unrelated to the merits of the . . . grievance . . . the [Union's] conduct was . . . inconsistent with its representational responsibilities." J.A. 42. The General Counsel declined to issue a complaint against the Institute.

Upon receiving notice of the General Counsel's decision, the Union entered into a settlement with the FLRA Regional Director pursuant to which the Union agreed that in the future, "where two or more employees are seeking one position" the Union would not refuse to "represent all such employees." J.A. 46. The settlement did

not provide any monetary relief to plaintiff. Plaintiff appealed the settlement to the General Counsel who rejected the appeal.

Approximately one year after the settlement was reached, plaintiff commenced this action, alleging that "[b]y refusing to arbitrate plaintiff's grievance" the Union had "breached its duty of fair representation" and the Institute had "breached the collective bargaining agreements." J.A. 11. The district court ruled that plaintiffs' claim against the Institute for breach of contract was not judicially cognizable, but that the claim against the Union was.

Following a trial on the merits, the district court found that the Union had violated its duty of fair representation, but further ruled that plaintiff was not entitled to back pay as "the court would merely be speculating if it ruled that plaintiff would have retained the course developer job and earned additional pay and benefits had the Union . . . assessed the merits of his grievances in ruling on his own arbitration request." J.A. 96. The sole recovery awarded to plaintiff was the "fees and costs he incurred in his litigation against [the Institute]" which were awarded to plaintiff as "'damages,'" and the "fees and costs he incurred in his suits against the Union" which were awarded under the "'common benefit rationale.'" J.A. 97, 99. In total, the Union was required to pay $35,000.

On appeal, the United States Court of Appeals for the Ninth Circuit reversed the judgment in plaintiff's favor. That court concluded that because the CSRA creates an express duty of fair representation and an express *administrative* cause of action for breach of that duty, it is inappropriate for the courts to imply a judicial fair-representation action under the Act. As Judge Noonan put it in his opinion for the Court, Congress, in creating a fair-representation duty under the CSRA had "tempered the remedy" and that therefore "[j]udicial crea-

tivity was restrained. We must act within the statutory scheme."

In light of the conflict among the circuits on this issue, on June 6, 1988, this Court granted plaintiff's petition for a writ of certiorari.

SUMMARY OF ARGUMENT

A. Title VII of the Civil Service Reform Act, in terms, imposes a duty of fair representation on federal sector unions, and that Title creates an express *administrative* cause of action to enforce that duty. There is no provision in the Act creating a *judicial* remedy for breaches of the fair-representation duty. The question posed here is whether the Court should imply such a cause of action. Pp. 8-10 *infra*.

B. A long line of cases in this Court establish that the answer to that question turns on congressional intent. Furthermore, in ascertaining that intent, this Court has stressed that where Congress has expressly created certain remedies to enforce a statutory duty, the logical conclusion—absent strong, contrary evidence—is that Congress provided all of the remedies the Legislature considered appropriate and did not intend other remedies not set forth in the statute. That principle is dispositive here in light of the express provision in CSRA Title VII addressed to the question of remedies. Pp. 10-13 *infra*.

Two additional considerations militate against implying a judicial remedy under CSRA Title VII for breach of that Title's duty of fair representation.

First, unlike the statutes that have been involved in the Court's other implied cause-of-action cases, the CSRA was passed *after* this Court had made plain that the question of whether there should be an implied right of action to enforce a particular statutory duty is one for Congress to resolve rather than the judiciary; the fact that, against that background, Congress created an ad-

ministrative remedy but not a judicial remedy is thus especially significant here. Pp. 13-14 *infra*.

Second, implying a judicial fair-representation remedy under CSRA Title VII would undercut that Title's carefully developed enforcement scheme. The bulk of fair-representation litigation involves challenges to a union's handling of grievances under a collective bargaining agreement, and to adjudicate such challenges the courts often are required to decide the merits of the underlying grievance. But in enacting CSRA Title VII, Congress decided—following extensive debate and as the result of a carefully-struck compromise between contending forces—to foreclose the courts from interpreting federal-sector collective bargaining agreements. Pp. 14-20 *infra*.

C. Petitioner bases his entire argument on the fact that this Court has implied a judicial fair-representation cause of action under two other labor relations statutes, the Labor Management Relations Act ("LRMA") and the Railway Labor Act ("RLA"). Petitioners' reliance on those lines of authority is doubly flawed.

First, there is no reason to believe that Congress intended, in enacting CSRA Title VII, to follow the RLA and LMRA implied-cause-of-action law. In enacting that Title Congress was, of course, wholly free to create a civil remedy to enforce the duty of fair representation which Congress created, or, alternatively to provide an exclusively administrative procedure to enforce that duty. And the RLA and LMRA case law is unhelpful in determining which course Congress intended. Although CSRA Title VII adopts certain basic concepts from the LMRA, the former statute was in no sense copied from the latter, and the similarities between CSRA Title VII and the LMRA are, on the whole, dwarfed by their differences. In fact, CSRA Title VII differs from the LMRA and RLA in three respects directly relevant here: CSRA Title VII creates an express duty of fair repre-

sentation, establishes an express administrative cause of action to enforce that duty, and channels virtually all litigation under federal sector collective bargaining agreements to the administrative agency. Pp. 20-24 *infra*.

Second, even if there were reason to believe that Congress intended the courts to follow the RLA and LMRA implied-cause-of-action case law in interpreting CSRA Title VII, those cases would not have led the 1978 Congress to believe that it was unnecessary to create an express judicial fair-representation remedy if such an action were intended. The lesson taught by *Steele v. L. & N. R. Co.*, the RLA case which is the fountainhead of fair-representation law, and *Syres v. Oil Workers*, in which the Court first recognized a judicial fair-representation cause of action under the LMRA, is that such a remedy will be implied in the *absence* of an administraitve remedy, and *not* where, as here, an express administrative remedy exists. And all that *Vaca v. Sipes*, on which petitioner so heavily relies, adds is that the creation of an administrative remedy *after* a judicial remedy is in place will not suffice to displace the pre-existing judicial remedy. Petitioner's attempt to derive a far more sweeping lesson from *Vaca* ignores both the context in which that case was decided, and the reasoning of the decision. Pp. 24-37 *infra*.

ARGUMENT

THE CIVIL SERVICE REFORM ACT DOES NOT GIVE RISE TO A JUDICIAL REMEDY FOR BREACH OF THE DUTY OF FAIR REPRESENTATION

The issue in this case is whether Title VII of the Civil Service Reform Act gives rise to an implied judicial—in addition to an express administrative—remedy to enforce the duty of fair representation which that Act imposes on unions acting as exclusive bargaining representatives. "The question of the existence of a statutory cause of action is, of course, one of statutory construction." *Touche Ross & Co. v. Redington, Trustee*, 442 U.S. 560, 569 (1979). "[A]s with any case involving the interpretation of a statute, our analysis must begin with the language of the statute itself." *Id.*

A. CSRA Title VII § 7114(a)(1) provides that

> A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents, and is entitled to act for and negotiate collective bargaining agreements covering, all employees in the unit. An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.

Section 7116(b)(8), 5 U.S.C. § 7116(b)(8), in turn, provides that "it shall be an unfair labor practice for a labor organization • • • to otherwise fail or refuse to comply with any provision of this chapter." And § 7118, 5 U.S.C. § 7118, provides for the prosecution of unfair labor practice complaints before, and the adjudication of such complaints by, the FLRA; that section, *inter alia*, empowers the FLRA to order such remedial action as will "carry out the purpose of this chapter," including an award of backpay to be paid by an "agency . . . or

. . . labor organization . . . found to have engaged in the unfair labor practice involved."

Read together, these provisions create an express *administrative* cause of action to enforce the duty of fair representation. As the FLRA has held, "[t]he duty of an exclusive representative to fairly represent all unit employees arises under the second sentence of § 7114(a)(1)." *National Federation of Federal Employees Local 1453*, 23 FLRA 686, 689 (1986).[1] Because CSRA § 7116(b)(8) makes any union violation of Title VII an unfair labor practice, it follows that "section 7116(b)(8) is violated by a labor union's failure to represent the interests of all employees in a bargaining unit without discrimination," *Tidewater Virginia Federal Employees Metal Trades Council*, 8 FLRA 221, 230 (1982). And the General Counsel of the FLRA has not hesitated to seek, nor has the FLRA hesitated to award, full relief to injured employees including, where appropriate, back pay in duty of fair representation actions brought under § 7116(b)(8). *E.g.*, *Machinists Local 39*, 24 FLRA 392

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[1] The FLRA has observed that, "[t]he second sentence of § 7114(a)(1) is virtually identical to the second sentence of § 10(e) of Executive Order 11491, as amended." *NFFE Local 1453, supra*, 23 FLRA at 960. That sentence was interpreted to require federal sector unions "to represent employees without arbitrariness or bad faith." *Id.* "Congress intended the Authority to apply a similar standard under the analogous provision in section 7114(a)(1) of the Statute." *Id.*

Indeed, at the very start of the legislative process that led to the enactment of CSRA Title VII, the House Subcommittee on Civil Service held a special briefing with respect to the status of federal sector labor relations under the Executive Order. *See* Briefing Before the Subcommittee on Civil Service of the House Committee on Post Office and Civil Service on the Federal Labor Relations Program, 95th Cong. 1st Sess. (1977). At that briefing, Anthony Ingrassia, the Director of the Office of Labor-Management Relations of the Civil Service Commision, testified in response to a specific question that under the Executive Order "[t]here is a duty of fair representation to all employees in the bargaining unit." *Id.*, at 25.

(1986); *American Federation of Government Employees Local 1857*, 28 FLRA No. 86 (Aug. 21, 1987).

While CSRA Title VII is plain in the foregoing regards, there is *no* provision in that Act creating a *judicial* cause of action to enforce the duty of fair representation. Thus, petitioner's basic claim, which we now address, is that the Court should *imply* such a cause of action from the Act.

B. (1) There was a time when this Court assumed that any statute "enacted for the benefit of a special class" gave rise to a civil remedy "for members of that class." *Merrill, Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 374 (1982). Beginning with its decisions in *Passenger Corp v. Passenger Assn.*, 414 U.S. 453 (1974), and *Cort v. Ash*, 422 U.S. 66 (1975), however, the Court broke with the past and adopted a "decidedly different approach . . . to cause of action by implication," *Cannon v. University of Chicago*, 441 U.S. 677, 698 n.24 (1979).[2]

Under the present approach, the "dispositive question," *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 24 (1979), and "ultimate issue is whether Congress intended to create a private right of action," *California v. Sierra Club*, 451 U.S. 287, 293 (1981). As the Court reminded just last Term, "unless this congressional intent can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist." *Thompson v. Thompson*, —— U.S. ——, 56 L.W. 4055, 4057 (January 12, 1988). The Court "will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide." *Id.*[3]

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[2] *See also Piper v. Chris-Craft Industries*, 430 U.S. 1 (1977); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

[3] *See also Touche Ross & Co. v. Redington, Trustee, supra*, 442 U.S. at 575 ("The central inquiry remains whether Congress intended to create . . . a private cause of action"); *Universities Research Assn. v. Coutu*, 450 U.S. 754, 770 (1981) ("the question here is ultimately one of congressional intent"); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15 (1979) (semble); *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981) ("Our focus . . . is on the intent of Congress"); *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 536 (1984) (same); *Middlesex Cty. Sewerage Auth. v. Sea Clammers*, 453 U.S. 1, 13 (1981) ("The key to the inquiry is the intent of the Legislature"); *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146-47 (1985).

Of particular moment here, in resolving the question of congressional intent this Court has repeatedly emphasized that it is an "elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Transamerica Mortgage Advisors, Inc. v. Lewis, supra;* 444 U.S. at 19.[4] That canon reflects this Court's "reluctan[ce] to tamper with an enforcement scheme crafted [by Congress] with . . . evident care," *Massachusetts Mut. Life Ins. Co. v. Russell, supra*, 473 U.S. at 147. And the Court's approach recognizes, as well, that the existence of a "remedial scheme expressly fashioned by Congress strongly evidences an intent not to authorize additional remedies," *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 93 (1981), and makes it "highly improbable that 'Congress absentmindedly forgot to mention an intended private action,'" *Transamerica Mortgage Advisors v. Lewis, supra*, at 20. For both of these reasons, where Congress has expressly addressed the question of remedy "[i]n the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate." *Middlesex Cty. Sewage Auth v. Sea Clammers, supra*, 453 U.S. at 15.

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[4] *See also Middlesex Cty. Sewerage Auth. v. Sea Clammers, supra*, 453 U.S. at 14-15; *Massachusetts Mut. Life Ins. Co. v. Russell, supra*, 473 U.S. at 147.

(2) The instant case is controlled by the foregoing principles.

(a) As we have seen, in enacting CSRA Title VII, Congress treated expressly with the duty of fair representation and with the issue of remedies for violations of duties created by that Title. Thus, § 7114(a)(1) places labor unions under an express duty to "represent[] the interests of all employees in the unit without discrimination." And § 7116(a)(8),(b)(8) makes it an "unfair labor practice"—remediable through the FLRA—for either an agency or labor organization to "fail or refuse to comply with any provision of this chapter." Neither of these provisions has any counterpart in the Labor Management Relations Act of 1947, 29 U.S.C. §§ 151 *et seq* ("LMRA"), even though the unfair labor practices proscribed by CSRA § 7116 are in large measure derived from LMRA § 8(a),(b). Nor is there any analogue to § 7114(a)(1) or § 7116(b)(8) in the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* ("RLA"), our other basic federal labor law.

Rather, CSRA §§ 7114(a)(1) and 7116(b)(8) are unique provisions, crafted specially by Congress for CSRA Title VII. The office of the latter section is to authorize the FLRA to enforce *all* of the duties created by CSRA Title VII, including, of course, the duty of fair representation stated in § 7114(a)(1). That Congress went to such pains to create an administrative remedy for fair-representation violations makes the "assumption of inadvertent omission . . . especially suspect." *Massachusetts Mut. Life. Ins. v. Russell, supra*, 473 U.S. at 146.

(b) *United States v. Fausto*, —— U.S. ——, 56 L.W. 4128 (Jan. 25, 1986) further supports—indeed, in our view, compels—this conclusion. In *Fausto*, a federal employee who had received a thirty day disciplinary suspension filed suit in the Court of Claims pursuant to the Back Pay Act, which in terms creates an entitlement to

back pay for any federal employee found "to have been affected by an unjustified or unwarranted personnel action." 5 U.S.C. § 5596(b)(1). The question presented was "whether the [CSRA], which affords an employee in respondent's situation no review of the agency's decision, precludes such a Claims Court suit." 56 L.W. at 4129. This Court held that the CSRA has such preclusive effect, as the Court was persuaded that Congress had "prescribe[d] in great detail the protections and remedies applicable," and had created an "integrated scheme of administrative and judicial review," *id.* at 4130, and thereby had impliedly " 'repealed' . . . the Back Pay Act's implication allowing review in the Court of Claims of the underlying personnel decision giving rise to the claim for backpay," *id.* at 4132.

In this case, of course, the question is *not* whether Congress intended to foreclose a cause of action created by another federal statute but rather whether Congress intended in CSRA Title VII to *create* a cause of action not spelled out in that law. The comprehensiveness of the CSRA remedial scheme which sufficed to preclude a Back Pay Act claim in *Fausto* at least equally precludes the implication of a new cause of action from the CSRA.[5]

(3) Two additional considerations militate against implying a judicial remedy under CSRA Title VII for breach of that Act's duty of fair representation.

(a) First, unlike the statutes that have been involved in this Court's other implied-cause-of-action cases, Congress passed the CSRA in 1978, *after* this Court, in its seminal decisions in *Passenger Corp. v. Passenger Assn. supra*, and *Cort v. Ash, supra*, had adopted its "decidedly different approach . . . to cause of action by implication,"

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[5] *Cf. also Bush v. Lucas*, 462 U.S. 367, 388 (1983), in which the Court held that the "comprehensive nature of the remedies currently available" to federal employees made it inappropriate for the courts to "create[e] . . . a new judicial remedy" to redress violations of federal employees' constitutional rights.

Cannon v. University of Chicago, supra, 441 U.S. at 698 n.24. Prior to those decisions, as then Justices Rehnquist and Stewart observed in their concurring opinion in *Cannon*, "Congress . . . tended to rely to a large extent on the courts to *decide* whether there should be a private right of action, rather than determining this question for itself" and this Court's decisions "gave Congress good reason to think that the federal judiciary would undertake this task." *Id.* at 717 (emphasis in original). But the Court's "quite different . . . analysis" in *Cort v. Ash, supra*, and its progeny changed all that by "appris[ing] the lawmaking branch of the Federal Government that the ball, so to speak, may well now be in its court." 441 U.S. at 717.

Against that legal background, the fact that Congress, in enacting the CSRA, did create an express administrative remedy for breaches of the duty of fair-representation and did *not* create any judicial remedy precludes an inference that Congress intended both an administrative and a judicial remedy.

(b) Second here, as in *Universities Research Assn. v. Coutu, supra*, "[t]he implication of a private right of action would undercut . . . the [Act's] elaborate administrative scheme." 450 U.S. at 783. To explain why this is so we must first briefly review the nature of fair-representation claims and the structure of CSRA Title VII.

As is true of the instant case, the bulk of fair-representation litigation involves challenges to the manner in which a union has processed a grievance under a collective bargaining agreement. In such litigation, as this Court has held on at least four occasions, the plaintiff "must ordinarily establish both that the union breached its duty of fair representation and that the employer breached the collective bargaining agreement." *Clayton v. Automobile Workers*, 451 U.S. 679, 683 n.4 (1981). *See also Hines v. Anchor Motor Freight*, 424 U.S. 554,

570-71 (1976); *United Parcel Service v. Mitchell*, 451 U.S. 56, 62 (1981); *DelCostello v. Teamsters*, 462 U.S. 151, 165 (1983). This is the governing rule if the plaintiff sues the union, sues the employer or sues both; "the case he must prove is the same whether he sues one, the other, or both." *Id.* Thus, the typical fair-representation claim is necessarily, "'a direct challenge to "the private settlement of disputes"'" under the applicable collective bargaining agreement. *Id.*[6]

In enacting CSRA Title VII, Congress expressly decided *not* to open the courts to such "direct challenges" with respect to agreements negotiated pursuant to that Act or to authorize the courts to decide whether a collective bargaining agreement was breached. The CSRA does *not* contain an analogue to § 301 of the LMRA, 29 U.S.C. § 185, the provision authorizing the federal courts to enforce private-sector collective bargaining agreements. To the contrary, in enacting CSRA Title VII Congress decided *not* to permit the courts to entertain suits to compel arbitration under federal-sector collective agreements, suits which would have necessitated a judicial decision as to whether a grievance falls within an arbitration provision in such an agreement, *see Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574 (1960). Congress in enacting CSRA Title VII likewise determined *not* to permit courts to entertain suits to enforce or vacate federal sector arbitral awards, suits which would have necessitated judicial review of arbitral interpretation of federal-sector agreements, *see Steelworkers v. Enterprise Corp.*, 363 U.S. 593 (1960).[7]

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[6] Thus petitioner's claim that "fair representation lawsuits" do not require "examination of the provisions of the [collective bargaining] agreements themselves," Pet. Br. at 32, is untenable.

[7] The House-approved version of the bill that became the CSRA included a section authorizing *direct recourse* to the federal courts in suits to *compel* arbitration. *See* H.R. 11280, 95th Cong. 2d Sess. § 7121(c) (1978), *Legislative History of the Federal Service Labor-*

In lieu of LMRA § 301-type actions CSRA Title VII provides that questions of arbitrability under federal labor contracts are to be resolved by arbitrators and not by the courts, *see* § 7121(a)(1), 5 U.S.C. § 7121(a)(1), and that an employer's refusal to submit an arbitrability issue to arbitration constitutes a breach of Title VII and hence an unfair labor practice under § 7116(a)(8). Congress also provided that, subject to limited exceptions,[8] *all* challenges to arbitral decisions (including decision regarding arbitrability) are to be submitted to the FLRA for decision, *see* § 7122, 5 U.S.C. § 7122. In these respects CSRA Title VII follows the precise model that Congress *rejected* in enacting the LMRA.[9] Moreover, § 7123(a)

Management Relations Statute, Title VII of the Civil Service Reform Act of 1978 at 978 (hereinafter "Leg. Hist."). That provision was rejected in Conference. *See* p. 18, *infra*.

The House bill was in significant measure drawn from a bill introduced by Representative Clay, the Chairman of the House Subcommittee on Civil Service, and a second bill introduced by Representative William Ford, a senior member of that Subcommittee and of the Committee on Post Office and Civil Service, at the start of the Ninety-Fifth Congress. *See* H.R. 13, 95th Cong., 1st Sess. (1978), Leg. Hist. at 121-83; H.R. 1589, 95th Cong. 1st Sess. (1977), Leg. Hist. 189-234. The Ford bill, as introduced, provided access to the courts not only to compel arbitration but also to enforce arbitral awards, *see* H.R. 1589, § 8, Leg. Hist. at 212-13; that proposal did not survive Committee consideration.

[8] Under CSRA Title VII § 7122(d), (f), where challenges to personnel actions based on unacceptable performance or to adverse actions are raised under a contractual grievance procedure—rather than appealed to the Merit Systems Protection Board ("MSPB") pursuant to the statutory appeal mechanism created by the CSRA, *see* 5 U.S.C. §§ 4303, 7512—the arbitrator's decision may be appealed directly to the MSPB if a claim of discrimination is involved or the arbitrator's decision may be appealed to court (rather than to the FLRA) in the same manner as a decision by the MSPB, *see* 5 U.S.C. § 7703.

[9] The Court reviewed the pertinent LMRA legislative history in *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957), explaining

(1), 5 U.S.C. § 7123(a)(1), precludes *any judicial review whatsoever* of decisions by the FLRA in matters "involving an award by an arbitrator."[10] Congress, then, could not have been clearer in signifying its intent to foreclose the courts from deciding under the CSRA the type of contract issues that necessarily would be raised if a civil remedy for breach of the duty of fair representation were implied from that Act.

Congress' decision to thus circumscribe the role of the courts under CSRA Title VII was, moreover, the product of extensive debate and an ultimate compromise between contending forces. "Prior to the enactment of Title VII, labor-management relations in the federal sector were governed by a 1962 Executive Order" which was "administered by the Federal Labor Relations Council, a body composed of three Executive Branch management officials whose decisions were not subject to judicial review." *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 91 (1982). During the legislative process that led to the passage of the CSRA, the Carter Administration urged Congress to continue that basic structure by enacting a law under which decisions of the FLRA "on any matter within its jurisdiction shall be final and

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that in the 1947 Congress which enacted the LMRA, the House had passed a bill which would have made it a violation of the duty to bargain to fail to follow an agreed-upon grievance-arbitration procedure, and the Senate had passed a bill which would have made it an unfair labor practice to violate a collective agreement or an agreement to submit a dispute to arbitration. *See id.* at 452, n.8. "This feature of a law was dropped in Conference," as the Conference Committee decided to leave contract enforcement " 'to the usual process of the law and not to the National Labor Relations Board.' " *Id.* at 452, *quoting* H.R. Rep. No. 510, 80th Cong. 1st Sess. 42 (1947).

[10] Petitioner is thus simply wrong in asserting that "in enacting the CSRA Congress intended to adopt the same basic framework for resolving collective bargaining disputes as existed in the private sector." Pet. Br. at 21.

conclusive" and not subject "to review . . . by an action in the nature of mandamus . . . or by any other means." [11]

The House rejected the Carter Administration's entreaties and passed a bill which provided for judicial review of all FLRA decisions, including decisions on exceptions from arbitration awards; in addition, as previously noted, the House bill provided for direct access to the courts in actions to compel arbitration. *See* H.R. 11280, *supra*, §§ 7121(c), 7123, Leg. Hist. 978, 979.[12] In contrast, the Senate passed a bill which contained *no* authorization for suits to compel arbitration, and which provided that except for arbitral decisions involving personnel actions based on unacceptable performance or involving other adverse actions, challenges to arbitral awards were to be submitted to the FLRA for *final* decision; under that bill, only FLRA decisions covering

[11] The Carter Administration proposal was introduced by Senator Ribicoff as Amendment 2084 to S.2640, 95th Cong. 2d Sess. (1978), a bill embodying the Carter Administration's recommendations for civil-service reform which Senator Ribicoff had introduced at the Administration's request. *See* Leg. Hist. at 1006-08. The quote in text is from § 7164(k) of Amendment 2084, Leg. Hist. 458. *See also* § 7171(j) of the Amendment, Leg. Hist. 473, precluding review of FLRA decisions on exceptions to arbitration awards.

[12] The version of CSRA Title VII adopted by the House was first proposed by Representative Udall, the ranking member of the Post Office and Civil Service Committee, as a substitute for Title VII of the bill reported by the Post Office and Civil Service Committee. *See* Leg. Hist. at 907-22, 962.

In approving that amendment, the House rejected an alternative substitute amendment offered by Representative Collins and "reflect[ing] what I understand to be the administration's position on codifying our present Executive Order program of labor-management relations," Leg. Hist. 906. Under the Collins amendment, as under the Carter administration bill, decisions of the FLRA were to be "final and conclusive" and not subject to judicial review. *Id.* at 897. Representative Collins referred to this as one of "the four major places where my amendment differs from the Udall substitute," and termed the dispute over judicial review a "major concern." Leg. Hist. at 935, 936.

matters not growing out of a collective agreement would have been subject to judicial review. *See* S. 2640, *supra*, §§ 7204(1), 7216(f), 7221(j), (k), Leg. Hist. at 571, 584-85, 596-97.[13]

In conference, the differences between the House and Senate bills with respect to the role of the courts under CSRA Title VII emerged as a major issue in dispute. Senator Ribicoff identified this as one of a handful of "serious problems" the Senate had with the House's approach.[14] To break an emerging deadlock Representative Udall, the chairman of the conference, offered a compromise proposal under which the Senate would agree to the bulk of the House's version of CSRA Title VII, but the House would accept the Senate's decision to keep the courts essentially out of the business of considering disputes under collective bargaining agreements by foreclosing access to the courts either to compel arbitration or to obtain review of FLRA decisions on exceptions to arbitral awards.[15] The Senate conferees accepted that proposal which was then enacted into law. *See* CSRA

[13] The Senate Committee on Governmental Affairs had reported out a bill which largely followed the Carter Administration's proposal, including its recommendation to preclude all judicial review of FLRA decisions. *See* S. 2640, *supra*, §§ 7204(1), 7221(j), Leg. Hist. 513-14, 536. On the floor of the Senate, Senators Ribicoff and Percy, as the managers of the bill, accepted an amendment by Senator Stevens to provide for judicial review of FLRA decisions in unfair labor practice proceedings. Leg. Hist. 1036-38.

[14] The meetings of the conference committee were officially transcribed; the transcripts are available, *inter alia*, from the Merit Systems Protection Board. The quote in text is from the transcript of the conference meeting of September 27, 1978, p. 18.

[15] *Id.* at 46-55. The House also agreed to foreclose judicial review of FLRA decisions in representation proceedings. The Senate, in response, agreed to permit arbitrators to resolve all arbitrability disputes, rather than leaving some for decision by agency heads. Thus, petitioner's assertion that the judicial-review provisions of the "Udall substitute essentially became 5 U.S.C. § 7123(a) and (b)," Pet. Br. at 25 n.6, is incorrect.

Title VII §§ 7121(a)(1), 7123, 5 U.S.C. §§ 7121(a)(1), 7123.[16]

(4) In sum, this is the last case in which a civil remedy should be implied. Acting at a time when Congress knew that the Legislative Branch was responsible for shaping the appropriate remedies for its enactments, Congress elected to create an express *administrative* remedy for breach of the duty of fair representation, and left no hint of any intent to create a judicial cause of action as well. And implying such a cause of action—and thereby empowering the courts to decide the meaning of federal-sector collective agreements in the context of adjudicating fair-representation claims—would be directly contrary to the judgments Congress made in framing CSRA Title VII.

C. Petitioner makes no attempt to identify anything in CSRA Title VII or its history to support an implied cause of action here. Instead, petitioner bases his entire argument on the fact that this Court has implied a judicial fair-representation cause of action under two *other* labor relations statutes, the RLA and the LMRA. Petitioner's reliance on those lines of authority is entirely misplaced.

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[16] Petitioner goes to great pains, *see* Pet. Br. at 26-30, to prove that the absence of a CSRA analogue to LMRA § 301 does not preclude federal-court jurisdiction over fair-representation suits under the CSRA. We agree; federal-question jurisdiction under 28 U.S.C. § 1331 extends to any cause of action implied from a federal law.

What petitioner fails to realize, however, is that what is at issue here is *not* the existence *vel non* of federal *jurisdiction* but rather whether Congress, in enacting the CSRA, intended to create a judicial (as opposed to administrative) *cause of action* to enforce that Act's duty of fair-representation. And as explained in text, the absence of a CSRA analogue to LMRA § 301, and the judgments Congress made in crafting the CSRA regarding the appropriate role of the courts under that Act, are highly probative in assessing Congress' intent on this issue.

(1) At the threshold, it is important to bear in mind that in enacting CSRA Title VII Congress was wholly free to create a civil remedy to enforce that Title's duty of fair representation or, alternatively, to provide an exclusively administrative procedure to enforce that duty. There is no law of nature, nor any rule of law, that requires that legislatively-created duties be enforceable through the judicial, rather than the administrative, process.

As *Bush v. Lucas*, *supra*, teaches, the vindication of even *constitutional* rights may be confined to an administrative procedure, including a procedure that "provide[s] a less than complete remedy for the wrongs," 462 U.S. at 373. Moreover, the premise of the implied cause-of-action doctrine is that only some—rather than all—legal duties are judicially enforceable; the very point of the doctrine is to assure that *Congress* decides whether to create a judicial remedy for the rights and duties stated in federal enactments, and that the courts confine themselves to ascertaining Congress' intent in that regard. *See* pp. 12-14 *supra*.

Thus, the RLA and LMRA decisions on which petitioner relies are relevant here only insofar as those decisions were part of "the historical context" in which the CSRA was enacted, *California v. Sierra Club*, *supra*, 451 U.S. at 296-97, and shed light on the intent of the 1978 Congress that passed the CSRA. In particular, the relevant question with respect to those decisions is whether the 1978 Congress must have assumed from the decisions implying a judicial remedy for fair representation claims under the RLA and the LMRA that such a remedy would be implied from the CSRA as well.

(2) In addressing that question, it is worthy of emphasis that, although CSRA Title VII adopts certain concepts from the LMRA, this is *not* a case in which Congress proceeded by simply borrowing the text of a pre-existing statute, thereby producing "two statutes us[ing]

identical language," *Cannon v. University of Chicago*, *supra*, 441 U.S. at 695. Rather, every section—and, indeed, virtually every sentence—of CSRA Title VII, was drafted specifically for the CSRA (by congressional committees which do not even have jurisdiction over the LMRA), drawing far more extensively from the language of the Executive Order which had governed federal sector labor-management relations, *see* p. 17, *supra*, than from the LMRA. Even where Congress adopted a principle from the LMRA, unique language was drafted to incorporate that principle into CSRA Title VII and some of the particulars of the LMRA scheme were altered in the process.[17]

Moreover, the similarities between CSRA Title VII and the LMRA are, on the whole, dwarfed by their differences. For example, under the CSRA unions and employers bargain only over "conditions" of employment but *not* over wages or hours, *see* 5 U.S.C. § 7103(a)(11), and not over the multiple subjects that fall within the CSRA's "management rights" provisions, 5 U.S.C. § 7106; in contrast, LMRA § 8(d), 5 U.S.C. § 158(d), requires bargaining over "wages, hours, and other terms and conditions of employment," and largely leaves it to the parties to decide in bargaining the scope of management's rights. Similarly CSRA Title VII proscribes

[17] For example, like the LMRA—and unlike the Executive Order—CSRA Title VII vests enforcement powers in an independent administrative agency and independent general counsel. But CSRA §§ 7104-05, 5 U.S.C. § 7104-05, the provisions establishing the FLRA and its General Counsel, read quite differently from LMRA §§ 3-6, 29 U.S.C. §§ 153-56, the comparable sections in the LMRA. And indicative of the fact that, in crafting the CSRA, Congress did not follow the LMRA by rote, the CSRA provides for a smaller administrative agency than the LMRA, *compare* 5 U.S.C. § 7104(a) (FLRA consists of three members) *with* 29 U.S.C. § 153(a) (five-Member NLRB to replace three-member agency provided for by Wagner Act); and grants the General Counsel a longer term in office, *compare* 5 U.S.C. § 7104(f)(1) (five-year term) *with* 29 U.S.C. § 153(d) (four-year term).

strikes, slowdowns and picketing which "interferes with an agency's operations," 5 U.S.C. § 7116(b)(7), and instead provides a system for binding arbitration of issues unresolved in collective bargaining, *see* 5 U.S.C. § 7119; under the LMRA, "the use of economic pressure . . . is part and parcel of the process of collective bargaining," *Labor Board v. Insurance Agents*, 361 U.S. 477, 494 (1960), and the right to strike is specifically protected by statute, *see* LMRA § 13, 29 U.S.C. § 163. And CSRA Title VII imposes a host of duties on federal employers that the LMRA leaves to the collective bargaining process: *e.g.*, the duty to honor employee requests to have union dues deducted from their pay, 5 U.S.C. § 7115; the duty to grant union representatives official time off for purposes of participating in collective bargaining negotiations, 5 U.S.C. § 7131; and the duty to agree to a grievance procedure, 5 U.S.C. § 7121.

Against this background, it is plain that just as decisions under the LMRA "cannot be imported wholesale into the railway labor arena," *Railroad Trainmen v. Termial Co.*, 394 U.S. 369, 383 (1969), decisions under the LMRA and RLA cannot be imported wholesale into the CSRA. "Even rough analogies must be drawn circumspectively, with due regard for the many differences between the statutory schemes." *Id.*

This caution is particularly to the point in this case because the enforcement scheme of CSRA Title VII differs from the structure of the LMRA (and RLA) in at least three respects directly relevant here. *First*, the CSRA creates an express duty of fair-representation; in contrast, the RLA and LMRA fair-representation duties have been judicially implied from those laws. *Second*, as we have seen, the CSRA includes an express administrative cause of action to enforce the fair-representation duty; neither the RLA nor the LMRA contains any such provision. *Third*, the CSRA channels virtually all litigation under federal sector collective bargaining agreements

to the FLRA; under the LMRA and the RLA such litigation is channeled to the courts.

Given these differences, and given the fact that Congress enacted the CSRA after this Court had adopted its "decidedly different approach to cause of action by implication," p. 12, *supra*, there is no reason to believe that Congress intended, in enacting CSRA Title VII, to follow the RLA and LMRA implied-cause-of-action case law. Rather, the differences in the statutes—and in the times of their enactment—point to precisely the opposite conclusion.

(3) Even if, *arguendo*, there were reason to believe that Congress in shaping CSRA Title VII intended the courts to follow the RLA and LMRA implied-cause-of-action case law in interpreting CSRA Title VII, that would not carry the day for petitioner. For a detailed review of those cases and their rationale demonstrates that the law at the time provided *no* basis for implying a judicial fair representation remedy where Congress has created an express administrative remedy.

(a) *The RLA Cases. Steele v. L. & N. R. Co.*, 323 U.S. 192 (1944), is the fountainhead of the duty of fair representation jurisprudence. The threshold question in that case was "whether the Railway Labor Act imposes on a labor organization, acting by authority of the statute as exclusive bargaining representative of a craft or class of railway employees, the duty to represent all the employees in the craft without discrimination because of their race." *Id.* at 193. The Court, persuaded that such a duty was fairly "implied from the statute and the policy which it has adopted," *id.* at 204, answered that question in the affirmative:

> Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents, but it has also imposed on the representative a corresponding duty. We hold that the language of the Act . . . read in light of the purposes of the Act, expresses the aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them. [*Id.* at 202-03]

Having found a fair-representation duty in the RLA, the Court then turned to the "question . . . whether the courts have jurisdiction to protect the minority of the craft or class from the violation of such obligation." *Id.* at 193. The Court began its analysis by observing that RLA fair-representation claims did not raise representational issues "which have been relegated for settlement to the Mediation Board," nor were such claims "committed to the jurisdiction of the Railroad Adjustment Board." *Id.* at 205. "*In the absence of any available administrative remedy*," the Court reasoned, "the right here asserted . . . is of judicial cognizance." *Id.* at 207 (emphasis added). The Court added:

> That right would be sacrificed or obliterated if it were without the remedy which the courts can give for breach of such a duty or obligation . . . . [T]he statutory provisions which are in issue are stated in the form of commands. *For the present command there is no mode of enforcement other than resort to the courts*, whose jurisdiction and duty to afford a remedy for a breach of statutory duty are left unaffected. The right is analogous to the statutory right of employees to require the employer to bargain with the statutory representative of a craft . . . and like it is one *for which there is no available administrative remedy*. [*Id.*; emphasis added.] [18]

[18] In *Tunstall v. Brotherhood*, 323 U.S. 210, 213 (1944), a companion case to *Steele*, the Court held that the cause of action that *Steele* had implied from the RLA is one "arising under a law regulating commerce of which the federal courts are given jurisdiction." (That question was not decided in *Steele* because *Steele* came to this Court from a state court, and thus the only jurisdictional issue raised there concerned the scope of this Court's jurisdiction to review state-court judgments.)

The Court elaborated on the teaching of *Steele* in *Railroad Trainmen v. Howard*, 343 U.S. 768 (1952). That case was brought by a black employee who claimed that the defendant union had discriminated against black porters all of whom were excluded from the bargaining unit that the union represented. After finding that the RLA imposed a duty on unions to refrain from the type of discrimination alleged in the complaint, the Court addressed the remedy issue and stated:

> Here, as in the *Steele* case, colored workers must look to a judicial remedy to prevent the sacrifice or obliteration of their rights under the Act. For *no adequate administrative remedy can be afforded by the National Railroad Adjustment or Mediation Board.* The claims here cannot be resolved by interpretation of a bargaining agreement so as to give jurisdiction to the Adjustment Board . . . Nor does the dispute hinge on the proper craft classification of the porters so as to call for settlement by the National Mediation Board . . . Our conclusion is that the District Court has jurisdiction and power to issue necessary injunctive orders . . . [343 U.S. at 774; emphasis added.]

(b) *The LMRA Cases.* On the same day *Steele* was decided the Court concluded that the Wagner Act, the predecessor of the LMRA, imposed on labor unions "the responsibility of representing . . . fairly and impartially" the interests of "all the employees" in a bargaining unit. *Wallace Corp. v. Labor Board*, 323 U.S. 248, 255 (1944).[19] But the remedial question addressed in *Steele*

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[19] *Wallace Corp.* was, as noted in text, decided under the Wagner Act which, like the RLA, did not place any express duties on labor unions. Two years after *Wallace Corp.* Congress enacted the LMRA which amended the Wagner Act by, *inter alia*, placing a series of duties on unions. *See* LMRA § 8(b), 29 U.S.C. § 158(b).

Congress' action in proscribing unfair labor practices by unions—including a prohibition on discrimination against non-members, *see* LMRA § 8(b)(1)(A), (b)(2), 29 U.S.C. § 158(b)(1)(A), (b)(2)—

and *Howard* with respect to the RLA was not presented to this Court in a LMRA case until *Syres v. Oil Workers*, 350 U.S. 892 (1955).[20]

Syres came to this Court after an appellate-court had dismissed an LMRA fair-representation claim for lack of jurisdiction. Without argument and without issuing an opinion, the Court overturned the lower-court decision in a per curiam order based solely on the authority of *Steele*, *Tunstall* and *Howard*. That disposition followed logically from the RLA cases because like the RLA, the LMRA does *not* create either an express duty of fair representation or an express remedy for breaches of implied duties.

Several years after the decision in *Syres*, the National Labor Relations Board ("NLRB"), in *Miranda Fuel Co.*,

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arguably could have been read to state the limits of Congress' willingness, in 1947, to place duties on labor unions and thus to call into question the decision in *Wallace Corp.* to imply a fair-representation duty. Subsequently, of course, Congress has enacted express prohibitions on union discrimination on other grounds, such as race, gender, religion and national origin. *See* 42 U.S.C. § 2000e-2(c.) So far as we are aware, however, the Court was never asked to reconsider *Wallace Corp.* in light of the enactment of LMRA § 8(b), and thus the case became settled law.

[20] Two years before *Syres*, the Court decided *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953), in which the plaintiff claimed that a collective bargaining agreement "violated his rights . . . under the Selective Training and Service Act of 1940" and that the union's "acceptance of those provisions exceeded its authority as a collective-bargaining representative under the National Labor Relations Act, as amended." *Id.* at 331-32. In the course of rejecting that claim the Court observed that "the authority of bargaining representatives is not absolute" and includes an obligation to "make an honest effort to serve the interest of all . . . members [of the bargaining unit] without hostility to any." *Id.* at 337. Because *Huffman* arose under the Selective Service Act, however, the Court had no occasion to consider whether an LMRA fair-representation claim, standing alone, is judicially cognizable.

140 NLRB 181 (1962), *enf. denied*, 326 F.2d 172 (2d Cir. 1963), found such an administrative remedy in the LMRA. The NLRB reached this surprising conclusion by asserting that "the 'right' guaranteed employees by Section 7 of the Act 'to bargain collectively through representatives of their own choosing,' . . . gives employees the right to be free from unfair or irrelevant or invidious treatment by their exclusive bargaining agent." *Id.* at 185. From that premise the Board concluded that § 8(b)(1)(A)'s prohibition on conduct which "restrain[s] or coerce[s] employees in the exercise of the rights guaranteed in section 7" somehow "prohibits labor organizations, when acting in a statutory representative capacity, from taking action against any employee upon considerations or classifications which are irrelevant, invidious, or unfair." *Id.*

Given the large leaps in its reasoning, the *Miranda Fuel* rule has proved to be a controversial doctrine. The decision there was by a "sharply divided Board," *Vaca v. Sipes*, 386 U.S. 171, 176 (1967); and was denied enforcement by a unanimous Second Circuit panel, 326 F.2d 172. On three occasions this Court has declined invitations to endorse *Miranda Fuel*. *See Humphrey v. Moore*, 375 U.S. 335, 344 (1964); *Vaca v. Sipes*, *supra*, 386 U.S. at 186; *DelCostello v. Teamsters*, *supra*, 462 U.S. at 170.

Despite its shakiness as a precedent, the *Miranda Fuel* decision inevitably placed in question the holding of *Syres* recognizing a judicial remedy to enforce the duty of fair representation under the LMRA. For by the time *Miranda Fuel* was decided, this Court already had held, in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245 (1959), that "[w]hen an activity is arguably subject to § 7 or § 8 of the Act, the State as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board." Thus, if *Miranda Fuel* correctly found NLRB jurisdiction over fair representation claims, it would seem to follow, under

Garmon, that the judicial cause of action could not survive.

In *Vaca v. Sipes*, *supra*, this Court was asked to so rule. *See* 386 U.S. at 176-77 ("With the NLRB's adoption of *Miranda Fuel*, petitioners argue, the broad preemption doctrine defined in *San Diego Building Trades Council v. Garmon*, becomes applicable").[21] The Court in *Vaca* understood that the issue before it was whether "Congress, when it enacted [LMRA] § 8(b) in 1947, intended to oust the courts of their traditional jurisdiction to curb arbitrary conduct by the individual employee's statutory representative." 386 U.S. at 183. For a variety of reasons—which we discuss in detail below—the Court refused to "assume" such an intent "from the NLRB's tardy assumption of jurisdiction in these cases," and therefore refused to overturn *Syres*. 386 U.S. at 183.

(c) As the foregoing review of the RLA and LMRA cases makes clear, nothing in CSRA Title VII's "contemporary legal context," *Cannon v. University of Chicago*, *supra*, 441 U.S. at 699, would have led the 1978 Congress to believe that it was unnecessary to create an express judicial fair representation cause of action if such an action were intended. To the contrary, the lesson that *Steel* and *Howard* and *Syres* teaches is that such a remedy will be implied only "*[i]n the absence of any available administrative remedy*," and not where, as is true of CSRA Title VII, an express administrative remedy exists. P. 21 *supra*. And *Vaca* does not diminish the force of that lesson, for all that *Vaca* adds is that the creation of an administrative fair-representation

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[21] A similar argument was made to the Court three years before *Vaca* in *Humphrey v. Moore*, *supra*. The Court rejected that argument in two sentences, stating that since the claim before it "is one arising under § 301 of the Labor Management Relations Act," the complaint "was therefore within the cognizance of federal and state courts" even if the complaint alleged conduct which "is, or arguably may be, an unfair labor practice." 375 U.S. at 343.

remedy *after* a judicial remedy has been implied will not suffice to displace the preexisting judicial remedy.[22]

(4) Petitioner's argument rests on an entirely different reading of *Vaca*. According to petitioner, *Vaca* establishes that the existence of a system of exclusive representation "mandates a judicially enforceable duty of fair representation," Pet. Br. at 35, without regard to whether Congress, in creating the exclusive representation authority simultaneously creates an express fair-representation duty and an express administrative scheme to enforce that duty. Petitioner bases that argument on the following two sentences from *Vaca*:

> Were we to hold . . . that the courts are foreclosed by the NLRB's *Miranda Fuel* decision from this traditional supervisory jurisdiction, the individual employee injured by arbitrary or discriminatory conduct could no longer be assured of impartial review of his complaint, since the Board's General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint. The existence of even a small number of cases in which the Board would be unwilling or unable to remedy a union's breach of duty would frustrate the basic purposes underlying the duty of fair representation. [*Id.* at 182-83; citations omitted.] [23]

[22] Thus *Vaca* is of a piece with *Merrill Lynch v. Curran, supra*, in which the Court proceeded from the premise that the issue was not whether Congress "intended to create a new remedy, since one already existed; the question is whether Congress intended to preserve the pre-existing remedy." 456 U.S. at 378-79. Here, of course, there was no preexisting remedy as Congress was enacting an entirely new statute.

[23] While our case does not rest on the point, we respectfully suggest that this portion of the *Vaca* decision contains the least satisfying branch of the Court's reasoning. For present purposes it suffices to note that the duty of fair representation undoubtedly plays an important role in the statutory scheme, but that the duty is surely no more central than, *e.g.*, the duty placed on employers to refrain from discriminating against employees (or job applicants) on the basis of union membership or nonmembership. Yet the latter duty is enforceable only through the administrative process, and the General Counsel has unreviewable discretion to refuse to issue a complaint against a discriminating employer notwithstanding "the wrong done the individual employee," *Vaca*, 386 U.S. at 182 n.8.

For at least three reasons, petitioner's reliance on this language is misplaced.

First, petitioner ignores the *context* of the sentences on which he relies. As we have seen the fundamental issue in *Vaca* was whether Congress in enacting the LMRA intended to displace a preexisting judicial cause of action. Thus, the very paragraph on which petitioner relies ends as follows:

> For these reasons, we cannot assume from the NLRB's tardy assumption of jurisdiction in these cases that Congress, when it enacted [LMRA] § 8 (b) in 1947, intended *to oust the courts of their traditional jurisdiction* to curb arbitrary conduct by the individual employee's statutory representative. [*Id.* at 183; emphasis added.]

Here, in contrast, the very different question posed is whether CSRA Title VII is properly interpreted as showing a congressional intention to create a *new* head of jurisdiction for the federal courts in an area where none had previously existed. Thus, the portion of the *Vaca* opinion on which petitioner relies is *not* addressed to the issue presented here at all; for that reason alone it would be wrong to read *Vaca* to warrant implying a judicial fair-representation cause of action from CSRA Title VII.

Second, the concern with protecting individual employees voiced by the *Vaca* Court was *not* stated as an *independent* ground for preserving the LMRA fair-representation cause of action but rather was put forth as one of three considerations which together supported that decision.

The *Vaca* Court observed that "[a] primary justification for the pre-emption doctrine—the need to avoid conflicting rules of substantive law in the labor relations

area and the desirability of leaving the development of such rules to the administrative agency created by Congress for that purpose—is not applicable" in the context of LMRA fair-representation suits. *Id.* at 180-81. The *Vaca* Court explained:

> [W]hen the Board declared in *Miranda Fuel* that a union's breach of its duty of fair representation would henceforth be treated as an unfair labor practice, the Board adopted and applied the doctrine as it had been developed by the federal courts. Finally, . . . fair representation duty suits often require review of the substantive positions taken and policies pursued by a union in its negotiation of a collective bargaining agreement and in its handling of the grievance machinery; as these matters are not normally within the Board's unfair labor practice jurisdiction, it can be doubted whether the Board brings substantially greater expertise to bear on these problems than do the courts . . . [*Id.* at 181; citations omitted.]

The *Vaca* Court also stressed that "[t]here are . . . some intensely practical considerations which foreclose preemption of judicial cognizance of fair representation duty suits, considerations which emerge from the intricate relationship between the duty of fair representation and the enforcement of collective bargaining contracts." *Id.* at 183. Noting that under LMRA § 301 proof of a breach of duty by the union suffices to allow an employee to bring a breach of contract action against his employer "in the face of a defense based on the failure to exhaust contractual remedies," the *Vaca* Court reasoned that

> it is obvious that the courts will be compelled to pass upon whether there has been a breach of the duty of fair representation in the context of many § 301 breach-of-contract actions . . . What possible sense could there be in a rule which would permit a court that has litigated the fault of employer and union to fashion a remedy only with respect to the employer? Under such a rule, either the employer would be compelled by the court to pay for the unions' wrong—slight deterrence, indeed, to future union misconduct—or the injured employee would be forced to go to two tribunals to repair a single injury. Moreover, the Board would be compelled in many cases either to remedy injuries arising out of a breach of contract, a task which Congress has not assigned to it, or to leave the individual employees without remedy for the union's wrong. [*Id.* at 187-88.]

Given the complex of considerations discussed in *Vaca*, that decision cannot fairly be read to hold that the LMRA provision granting unions exclusive representative status, in and of itself, establishes that Congress intended to preserve the preexisting fair representation remedy. *A fortiori*, *Vaca*, cannot be fairly read to hold that such a provision suffices to give rise to a judicial fair representation cause of action. Rather, the very most that can be extracted from *Vaca* is that such a provision is one factor that weighs against attributing to Congress an intent to repeal a fair representation cause of action once such an action has been recognized.

Vaca's reasoning thus falls far short of providing a basis for imputing to Congress an intent to *create* an implied judicial cause of action here. Indeed, given the structure of CSRA Title VII, *Vaca*'s reasoning would *not* support the inference that a pre-existing implied cause of action (if there had been one) was intended to survive that Title's enactment. For two of the three factors on which the Court in *Vaca* relied in concluding that Congress did not intend to repeal the existing LMRA remedy are absent here.

Unlike the NLRB, whose jurisdiction under the LMRA is limited to resolving representation disputes and adjudicating unfair labor practice claims, the FLRA is empowered by the CSRA to hear virtually all challenges to arbitral awards interpreting federal sector collective bargaining agreements, and its power in this regard is exclusive. Pp. 23-24, *supra*. In addition, CSRA Title VII

§ 7117(b), (c) confers on the FLRA a special authority to decide "negotiability disputes," *viz.*, disputes as to whether a particular matter is subject to bargaining or falls within the management rights provision of the Act; the existence of this power causes the FLRA to become extensively involved in reviewing the collective bargaining process under CSRA Title VII. Thus, in sharp contrast to the situation under the LMRA, the FLRA *does* "bring[] substantially greater expertise to bear on these problems than do the courts." *Vaca*, 386 U.S. at 181.

Similarly, because CSRA Title VII contains no analogue to LMRA § 301—because, in other words, that Title does *not* create a judicial remedy against federal employers to enforce collective bargaining agreements—the "practical considerations" on which the *Vaca* Court relied preclude implying such a remedy for CSRA fair representation claims. Under such an implied action, the judiciary would be required "to remedy injuries arising out of a breach of contract, a task which Congress has not assigned to it." *Vaca*, 386 U.S. at 188. And because the courts in all events cannot provide relief against federal employers, implying a cause of action against federal sector unions would leave an employee victimized by a breach of contract which the union wrongfully failed to grieve with only a partial remedy, thereby forcing the individual "to go to two tribunals to repair a single injury." *Id.*

Thus, read as a whole, the complex of considerations discussed in *Vaca* militate against implying from the CSRA a civil remedy to enforce the duty of fair representation.

Third and finally, insofar as *Vaca* emphasizes the interest of the individual employee in obtaining "impartial review of his [fair-representation] complaint," the decision reflects the Court's sensitivity to the fact that the LMRA's grant of exclusive-representative status to unions "extinguishes the individual employee's power to

order his own relations with his employer," *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967), and to that extent, in *Vaca*'s words, works a "corresponding reduction in the individual rights of the employees" and "strip[s those employees] of traditional forms of redress." 386 U.S. at 182.[24] The CSRA does not have a like effect, however, because, as the Solicitor General explained in his brief *amicus curiae* in this case:

> In the federal sector . . . employment is a result of appointment, *not of contract* (*see Army & Air Force Exchange Service v. Sheehan*, 456 U.S. 728, 745-41 (1982)), and the statutory grant of exclusive bargaining power does not strip a federal employee of substantial pre-existing rights. The employee has no right to make or enforce an individual contract of employment with his agency-employer, and the exercise of exclusive bargaining powers by the union does not deprive the appointed individual of any statutory or constitutional protections. In particular, the CSRA did not deprive petitioner of any rights he would otherwise have had or have been contractually able to obtain against his employer with respect to the promotion at issue. See *United States v. Testan*, 424 U.S. 392 (1976); *Arnett v. Kennedy*, 416 U.S. 134 (1974). [Br. for U.S. at 16; emphasis added.]

The only right that an individual federal employee had, prior to the enactment of the CSRA, to shape the terms

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[24] The Court had made this same point in *Steele*, as well, in first recognizing the duty of fair representation. *See* 323 U.S. at 202 ("Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents"). *See also, e.g., DelCostello v. Teamsters*, 462 U.S. 151, 164 n.8 (1983) ("the duty of fair representation exists because it is the policy of the [LMRA] to allow a single labor organization to represent collectively the interests of all employees within a unit, thereby depriving individuals in the unit of the ability to bargain individually or to select a minority union as their representative").

and conditions of his or her employment was the right, at least in certain circumstances, to enforce the statutes and regulations which define the terms of civil service employment. In enacting the CSRA, Congress preserved and expanded upon that right by providing for appeals of adverse actions and of performance actions to the Merit Systems Protection Board, *see* 5 U.S.C. §§ 4302, 7512, and by providing recourse with respect to "prohibited personnel practices" through the Special Counsel, *see* 5 U.S.C. § 2302(b); these remedies are in addition to remedies available to federal employees through the Comptroller General, *see* 4 C.F.R. part 31, and through the Equal Employment Opportunity Commission under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16.

More importantly for present purposes, in enacting CSRA Title VII, Congress went to great pains to assure that the creation of a collective bargaining system with exclusive representation would *not* extinguish an individual employee's freedom to invoke any of these remedies. Thus, § 7114(a)(5), 5 U.S.C. § 7114(a)(5), provides that:

> The rights of an exclusive representative under the provisions of this subsection shall not be construed to preclude an employee from—
>
> (A) being represented by an attorney or other representative, other than the exclusive representative, of the employee's own choosing in any grievance or appeal action; or
>
> (B) exercising grievance or appellate rights established by law, rule, or regulation;
>
> except in the case of grievance or appeal procedures negotiated under this chapter.

And CSRA Title VII § 7121, 5 U.S.C. § 7121, which governs contractual grievance procedures under the Act, requires that all such procedures preserve for individual

employees the right, in lieu of prosecuting a contractual grievance, to file a prohibited personnel practice charge or an adverse action appeal before the Merit Systems Protection Board.

(5) The short of the matter, then, is this. The CSRA is a unique law which creates its own form of exclusive representation and contains its own remedial scheme. In enacting that law, Congress had no reason to assume from the RLA or LMRA cases that the courts would imply a judicial remedy to enforce the duty of fair representation in addition to the administrative remedy Congress expressly created, especially when Congress so carefully excluded the judiciary from any role in adjudicating claims under or involving, federal sector collective bargaining agreements. To the contrary, the decided case law as of 1978—both the case law under the RLA and LMRA and also the implied-cause-of-action decisions—pointed to the opposite conclusion.

Given the state of the law it was incumbent upon the 1978 Congress to create an express judicial cause of action if such was its intent. Congress did not do so, and left no reason to believe that this omission was the result of an absent-minded oversight. Thus, regardless of whether the addition of such a remedy would detract from or "improve upon the statutory scheme that Congress enacted into law," it is "'not for us to fill any *hiatus* Congress has left in this area.' . . . [I]f Congress intends . . . such a federal right of cation, it is well aware of how it may effectuate that intent." *Touche, Ross & Co. v. Redington, Trustee, supra*, 442 U.S. at 578-79.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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